Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-585

STATE OF INDIANA, et al.,

Petitioners,

VS.

KHALID CHOUDHRY,

Respondent.

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# BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondent prays that the Petition for Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 22nd day of July, 1977, be denied.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has been reported at 559 F.2d 1085 (7th Cir. 1977).

## JURISDICTION OF THIS COURT

See petition.

## QUESTIONS PRESENTED FOR REVIEW

See petition.

## STATEMENT OF THE CASE

Respondent Choudhry began his employment as a correctional officer at the Indiana State Prison on April 12, 1976. During his term of employment, he became concerned over what he felt were deficiencies in his training and in security conditions at the prison. When his attempts to correct these problems by contacting his superiors did not produce the results he sought, he felt compelled to inform the general public of his concerns. This was accomplished by subsequent contacts with members of the press on June 18, 1976.



Articles informing the public as to the nature of Choudhry's statements appeared in area newspapers the following day. When made aware of these articles, defendant Warden Jenkins issued an order suspending Choudhry from employment. After receiving a report from the hearing panel which questioned Choudhry on the matter, Jenkins ultimately decided that his employment with the Department of Corrections should be terminated. The asserted reasons for the termination were Choudhry's release of confidential information to non-corrections personnel and his failure to observe the chain of command in holding a press interview.

Choudhry initiated litigation and on July 19, 1976, a hearing was held on his motion for a temporary restraining order. At the hearing, the defendants conceded that his dismissal was prompted by his public statements. Choudhry's motion was denied, and the judge, on his own motion and without any previous notice as to his intentions, granted summary judgment for the defendants.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and remanded the case for further proceedings, stating

> "Rule 56 plainly does not authorize a court to enter an arbitrary summary judgment sua sponte against a party; indeed the express language of paragraphs (a) and (b) of the

> Rule discloses that a motion for summary judgment is to be made by a party."

The Seventh Circuit stated, in addition, that

> . . . to the extent the district court's decision here is based on a rejection of plaintiff's version of the operative material facts, it could not stand wholly apart from notice defects.

## ARGUMENT

Respondent's argument for the denial of certiorari focuses in two major areas: First, there is no disagreement among the circuits over the issue presented and consequently no important federal question has been raised; therefore, it would be inappropriate for this Court to grant certiorari in this case. Second, even if there is a substantial federal question raised, the specific circumstances of this case show that summary judgment was based upon the district court's improperly making findings of fact. This provides the second reason why the petition for writ of certiorari should be denied.



## I

## NO UNSETTLED OR IMPORTANT FEDERAL QUESTION HAS BEEN PRESENTED FOR REVIEW

Respondent has examined the various circuits which have passed upon the question of whether summary judgment should be granted in the absence of notice to the affected party and without a reasonable opportunity to gather sufficient evidence to contest the judgment. All circuits that have been presented with the question have uniformly held that this cannot be tolerated. Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971); Nationwide Amusements, Inc. v. Nattin, 452 F.2d 651 (4th Cir. 1974); Johnson v. Rac Corp., 491 F.2d 510 (4th Cir. 1974); Georgia So. & Fla. Ry. v. Atlantic Coast Line R.R., 373 F.2d 493 (5th Cir. 1967); Macklin v. Butler, 553 F.2d 525 (7th Cir. 1977); Dry Creek Lodge, Inc. v. U.S., 515 F.2d 926 (10th Cir. 1975). In the Third Circuit, two district court decisions have stressed with importance that an opportunity for discovery must be provided prior to any granting of summary judgment. Erie Technological Products, Inc. v. Centre Engineering, Inc., 52 F.R.D. 524 (M.D. Pa. 1971); Penn Galvanizing Co. v. Lukens Steel Co., 59 I.R.D. 74 (F.D. Pa. 1973). In the present case, discovery had not yet been initiated, and respondent had prepared only for a hearing on a temporary restraining order. The Seventh Circuit Court of Appeals recognized this fact in its decision: "The district court's award of summary judgment came with no warning, taking

plaintiff completely by surprise." (559 F.2d at 1088.) The action of the lower court was even more surprising because the judge had gone on record to the effect that he was limiting his attention to the restraining order. (559 F.2d at 1088.)

The circuit court further recognized that the district court's decision directly contradicted the express wording of Rule 56, noting that the Rule "contemplates" both notice and an opportunity to respond prior to the granting of summary judgment. (559 F.2d at 1088-89.)

Finally, this Court has itself recognized a distrust of summary dispositions.

> "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. . . If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966). The lower federal courts have similarly stressed this policy, particularly in regard to constitutional issues raised under 42 U.S.C. § 1983. As explained in Brown v. Strickler, 422 F. 2d 1000 (6th Cir. 1970), Congress in



enacting § 1983 created a specific legal remedy to redress state infringement of constitutionally guaranteed rights; frequent issuance of summary judgment against § 1983 litigants would therefore tend to abrogate the specific Congressional policy of protecting such rights. This would especially hold true when the case involved the preferred rights secured under the first amendment. Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976).

The above-enunciated interpretation of policy further supports the limitations of Rule 56 to its specific provisions and the necessity that district courts comply with the notice requirement of Rule 56(c).

In summary, the circuit court's decision in this case not only follows the express provisions of Rule 56, but it is also in compliance with the policies of this Court. Respondent has further shown that all circuits which have confronted the same or similar issues have decided uniformly in accordance with the Seventh Circuit's holding. Therefore, no federal question of substance has been raised and it is not appropriate for this Court to issue a writ of certiorari to review the appellate court's decision.

## II

## SUMMARY JUDGMENT WAS BASED UPON THE DISTRICT COURT'S IMPROPERLY MAKING FINDINGS OF FACT

Even if the legal issue presented by the State of Indiana amounts to a substantial federal question, the district court's grant of summary judgment was erroneous due to the presence of contested issues of material fact at that time.

Federal courts have long recognized that summary judgment is not proper when there is a dispute as to any material fact. Simler v. Conner, 372 U.S. 221 (1963); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Fountain v. Filson, 336 U.S. 681 (1949). In ruling on a motion for summary judgment the trial court is merely to determine whether a genuine issue remains and is not to resolve any existing factual issues. United States v. Diebold, Inc., 369 U.S. 654 (1962).

Upon examination of the record, the circuit court found numerous unresolved material factual issues and pointed to those issues with specificity. (559 F.2d at 1089-90). It is thus clear that in arriving at its grant of summary judgment, the trial court rebuked its obligation to determine only if there were no contested factual issues of materiality. Rather, it acted in excess of its authority and made determinations of fact, resolving them against the plaintiff in



the face of evidence to the contrary, as pointed out by the court of appeals. The factual situation in this case was wholly inappropriate for summary judgment, and for that reason, this court should refuse to order a writ of certiorari.

## CONCLUSION

This brief has detailed the reasons why this Court should not entertain certiorari in this matter. First, due to the uniformity of this circuits on this rule of law, the express wording of Rule 56, and policies adopted by the United States Supreme Court, there is no substantial question in need of resolution by this Court. Second, the fact that the District Court improperly granted summary judgment when there were existing questions of material fact clearly sustains the circuit court's reversal of the district court's decision. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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